Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-485

CARL KEISTER AND HOWARD G. WILLAMON, Petitioners,

v.

SAN DIEGO AND ARIZONA EASTERN RAILROAD,
a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Carl Keister and Howard G. Willamon respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on July 5, 1977.

OPINION BELOW

The opinion of the Court of Appeals appears in Appendix A hereto. It is unreported. The opinions and judgment rendered by the District Court for the Southern District of California also appear in Appendix B through D.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit Court was entered on July 5, 1977. On August 8, 1977, the

Court of Appeals ordered the issuance of mandate stayed until August 20, 1977. On August 24, 1977, the stay was extended until October 3, 1977. This petition for certiorari was filed within 90 days of the entry of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

An American citizen suffers an injury during the course of his employment by an American railroad engaged in interstate commerce. The employee is a brakeman on a train originating in San Diego, California. A portion of the train's route is within the Republic of Mexico and the employee has duties on both sides of the international border. As a result of a negligent act by the railroad within the United States, the employee is injured while in Mexico. He is performing duties in furtherance of interstate commerce at the time he is injured.

Quare, is the fact that the injury is sustained in a foreign country a bar to relief under the provisions of the Federal Employers' Liability Act as amended in 1939, 45 U.S.C. § 51 *et sec?*

STATUTORY PROVISIONS INVOLVED

These actions involve § 1 of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. § 51. As originally enacted § 1 provided that every railroad, while engaging in interstate or foreign commerce,

> "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its

> negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 Stat. 65.

An additional paragraph was added to the section in 1939. The amendment expanded the definition of "person . . . employed" in interstate or foreign commerce. The Amendment reads:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act . . . ." 53 Stat. 1404.

STATEMENT OF THE CASE

The Factual Background

Petitioner Howard G. Willamon, an American citizen, was employed as a brakeman by the respondent, an American railroad.[1] He was injured while working on a scheduled run which operated daily between San Diego and El Centro, California.[2] The railroad tracks between San Diego and El Centro follow a southeasterly route across the California border into the Republic of Mexico; run along that side of the border for about one-third of the total distance, then cross back into California for the balance of the trip.[3]

Mr. Willamon was injured on the Mexican side of the border while riding in the cab of the locomotive.[4] He was shot in the right eye by a metal B-B projected into the cab through an open

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1. References to the Record and other sources are set forth beginning at page 12.

window.[5] It was an almost everyday occurrence for the train, in that area, to be shot at by B-B guns and to be used as a moving target for rocks and other missiles.[6] Other employees had reported such incidents to the respondent and it was aware of the problem.[7] Nevertheless, the cab of the locomotive did not have any safety wire mesh screen or other protective devices on the windows to keep thrown or propelled objects from entering the interior of the cab.[8] The respondent admits that complaints concerning propelled missiles were more numerous for moves in Mexico than in California.[9] It had hired special agents to look for the perpetrators of the occurrences in California, but was not taking similar precautions in Mexico.[10]

Petitioner Carl Keister, an American citizen, was also injured while working for the respondent as a brakeman on a run originating in San Diego.[11] It was a switching operation involving the movement of freight cars in the vicinity of San Ysidro, California and Tijuana, Baja California, Mexico.[12] The destination of the trip is disputed. The respondent asserts it was Mexico; however, Mr. Keister contends the trip was designated as beginning and ending in San Diego.[13] For payroll purposes, "on-duty" hours for the trip were computed from the time the train left San Diego until it returned later the same day.[14]

Mr. Keister sustained a back injury in Mexico while operating a switch about one kilometer south of the border.[15] The respondent had knowledge that the switch was defective before the date of the injury.[16] Mr. Keister was not warned of the defect although it was customary for the respondent to do so by issuing bulletins from its offices in San Diego or San Ysidro.[17] The railroad tracks and associated facilities in Mexico were leased by the respondent.[18] The day after Mr. Keister was injured, the respondent sent an employee into Mexico to repair the switch.[19]

The Proceedings In The Courts Below

The petitioners brought the instant actions in the District Court of the United States for the Southern District of California. Each complaint alleged that the railroad and the employee were engaged in interstate commerce when the injury was sustained. Jurisdiction of the District Court was invoked because the actions arose and were brought pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et sec.*[20] In both actions, the respondent filed a motion to dismiss under the provisions of the Federal Rules of Civil Procedure: (1) for lack of jurisdiction over the subject matter pursuant to Rule 12(b)(1), and (2) because the complaint failed to state a claim upon which relief could be granted pursuant to Rule 12(h). In the alternative, respondent sought an order granting summary judgment, pursuant to Rule 56, on the ground that there was no genuine issue as to any material fact.[21] The sole basis for the motions was that petitioners sustained their injuries in a foreign country.[22]

The District Court granted respondent's motion to dismiss the *Keister* action for lack of jurisdiction over the subject matter and a judgment of dismissal on that ground was entered.[23] Respondent's motion was denied as to *Willamon,* but the District Court certified the question for an interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292(b).[24] The Court of Appeals affirmed the District Court's dismissal of the *Keister* action.[25] It permitted an interlocutory appeal of the *Willamon* action and reversed the judgment of the District Court.[26]

The Question Presented and the Statement Of The Case herein are based on the petitioners' contentions of the facts. The respondent denied many of these assertions in its answers to the complaints. However, it did not dispute them in connection with

its motions to dismiss, with one exception. It disputed the destination of the run on which petitioner Keister was working. Subject to that exception, petitioners' factual contentions were and are not an issue in determining whether the actions should have been dismissed.

REASONS FOR GRANTING THE WRIT

The petition presents an important jurisdictional question affecting the scope and effect of the 1939 amendment to the Act which has not been settled by this Court. It stems from this Court's decision in *New York Central Railroad Co. v. Chisholm*, 268 U.S.C. 29 (1925). That decision is cited by the Courts below as standing for the proposition that the Act does not apply to employees who sustain injuries while in foreign countries. *Chisholm* typified this Court's strict construction of the Act before it was amended by Congress in 1939. Since the amendment, this Court has consistently construed the Act liberally so as to permit recovery for injuries occurring under a variety of circumstances where relief was previously denied. However, the effect of the Amendment on the rights of employees injured in foreign countries has not been determined by this Court.

An entire class of American railroad employees is affected by the question presented. The class consists of employees whose duties carry them into foreign countries. The size of the class is unknown to petitioners, but it is reasonable to assume that it is substantial since thirteen states have rail lines crossing our national frontiers into Canada or the Republic of Mexico.[27] It is important to the interests of all these employees that the issue herein be resolved.

The respondent's basic contention is that American employees

whose duties carry them into foreign countries are, as a class, excluded from the benefits of the Act. The concept of class exclusion was rejected, in principle, by this Court in *Reed v. Pennsylvania Railroad Co.*, 351 U.S. 502 (1955). In *Reed*, a clerical employee of the railroad was injured when a cracked window pane in her office blew in upon her. The railroad advanced the argument that clerical employees as a class were excluded from the benefits of the Act. (At page 505.) This Court rejected that argument, stating:

> "[T]he 1939 amendment specifically affords protection to 'any employee' whose duties bring him within that amendment. There is no basis in the language of § 1 for confining liability of the railroad so as to exclude any class of railroad employees as a class. . . . Section 1 cannot be interpreted to exclude petitioner from its benefits without further consideration of the function she performs and its impact on interstate commerce.
>
> We think that the present petitioner is employed by the respondent in interstate commerce within the meaning of the 1939 amendment to § 1. Although the amendment may have been prompted by a specific desire to obviate certain court-made rules limiting coverage, the language used goes far beyond that narrow objective. It evinces a purpose to expand coverage substantially as well as to avoid narrow distinctions in deciding questions of coverage. Under the amendment, it is the 'duties' of the employee that must further or affect commerce, and it is enough if 'any part' of those duties has the requisite effect." (At page 506.)

The *Chisholm* decision and the decisions below are contrary, in principle, to the above interpretation of the 1939 Amendment by this Court. It is important that this Court settle the question so as to correct improper administration of the Act and prevent its erosion by the continued application of a narrow and anachronistic construction.

A resolution of the question is also important to promote the

policies of certainty and uniformity expressed by Congress when it enacted the 1939 Amendment. The report of the Senate Committee on the Judiciary notes that "in railroad switching service particularly, men may be engaged in interstate and intrastate commerce intermittantly several times during a single tour of duty."[28] The report goes on to note that "the Amendment will provide uniform treatment in the event of injury or death while so employed."[29] There is nothing in the legislative history of the Amendment to suggest that Congress intended to withhold the benefits of the Act from employees injured in foreign countries so long as their duties further or affect interstate or foreign commerce. To allow the *Chisholm* decision to stand under the circumstances presented would frustrate the humanitarian purpose of Congress without advancing any underlying policy of the Act or any legitimate interest of the respondent.

Several district courts and the Court of Appeals for the Ninth Circuit and for the Sixth Circuit have deferred to this Court on the question of the continued viability of the *Chisholm* decision. As a result, it is important that this Court exercise its power of supervision over matters involving the jurisdiction of the federal district courts. The District Court below expressed its view that the *Chisholm* decision was controlling as to *Keister* but not as to *Willamon*, stating:

> [I] don't think it was ever intended . . . by the Congress, as interpreted by the CHISHOLM case, that it would apply to a case such as a WILLAMON case where the train never stops, so to speak, it ran through the foreign country. I don't think they intended the employees to put on a sombrero as they crossed into Mexico and take it off when they get back to the United States.[30]

The District Court was also of the opinion that it was bound to apply *Chisholm* in the *Keister* action, even though it produced

the wrong result:

> I think it's wrong. I think the Supreme Court, today, would probably take a look at CHISHOLM under these facts, but I'm bound to follow what I think the Supreme Court says. I may be wrong, but in good conscience I must dismiss that case.[31]

The Ninth Circuit reversed the District Court's ruling as to *Willamon* and affirmed the dismissal of the *Keister* action. Without expressing an opinion as to the correctness of the result, the Ninth Circuit held, "Only the Supreme Court or Congress can properly modify the reading of the Act adopted in *Chisholm*." Similarly, in *Cox v. Chesapeake Ohio Railroad Co.*, 494 F.2d 349 (6th Cir. 1974), *cert. denied* 417 U.S. 977 (1974), the Sixth Circuit and the District Court for the Eastern District of Michigan deferred to this Court on the continued viability of *Chisholm*. The lower federal courts have demonstrated their reluctance to abandon the *Chisholm* decision without this Court's approval. It is important to the proper development of the law that this Court exercise its power of supervision by resolving what has become a recurring question of Federal jurisdiction.

The *Chisholm* decision is itself ambiguous and in need of clarification. Did this Court hold that the existence of a right of action under the Act turns upon: (1) the place of the injury or (2) the place of the negligent act? From the statement of facts set forth in the Certificate from the Circuit Court in *Chisholm*, and the briefs filed in this Court, it is undisputed that the negligence of the railroad, if any, occurred in Canada. If this Court intended *Chisholm* to turn on the place where the negligence occurred, the Courts below have erroneously extended *Chisholm* to a new and different factual situation. The distinction is that in the instant cases the negligence is alleged to have occurred within the United States.

The practical effects of allowing *Chisholm* to remain controlling law are counter-productive to the objective of the Act. The Act is intended to promote safety by permitting employees to recover for their employer's negligence. However, the *Chisholm* decision encourages carelessness and a niggardly approach to safety measures. The facts in *Willamon* present a graphic example. The respondent hired special agents to search for persons propelling missiles at trains in California. It did not do so in Mexico even though complaints concerning propelled missiles were more numerous for operations in Mexico than in California. Its decision not to do so is understandable. Why should the respondent have spent the money to hire guards, or to screen the windows of the locomotive, if it was not responsible for injuries occurring in Mexico? Similarly, in *Keister,* why should the respondent's San Diego office have been concerned about warning petitioner Keister that the switch in Mexico was defective, and why should it have felt any urgency about sending an employee into Mexico to repair the defect?

Allowing *Chisholm* to remain controlling law is also tantamount to reenacting the doctrine of assumption of risk which was repudiated by this Court in *Tiller v. Atlantic Coast Line Railroad Co.*, 318 U.S. 54 (1943), because the employee is required to assume the risk of being injured while working in a foreign country. This is particularly true in a case such as *Willamon* where the working conditions in the foreign country were more hazardous than in the United States.

Another practical effect of the *Chisholm* decision is to place railroad employees in a position where their likelihood of obtaining any meaningful recovery is uncertain. For example, petitioners contend that the California Workmens' Compensation laws provide no remedy where the employee's duties at the time of his

injury are in furtherance of or affect interstate commerce.[32] Respondent disagrees.[33] Even if the respondent is correct about the California Law, this Court is well aware that workmens' compensation laws vary substantially from state to state as to eligibility and benefits. Therefore, it is important to settle the question presented because of the practical effects of not doing so.

CONCLUSION

Railroad employees engaged in "transportation" have always been intended to be the primary beneficiaries of the Act because of the hazardous nature of their occupation. It is ironic if file clerks are entitled to the benefits of the Act and the petitioners are not. For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

JOSEPH J. MOGILNER AND
JOHN MICHAEL BOLLMAN
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ROBERT S. KENNEDY AND
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Counsel for Petitioners

REFERENCES TO THE RECORD AND OTHER SOURCES

"RT" refers to the Reporters' Transcripts of Proceedings in the District Court for purposes of appeal. "K" refers to the Clerk's Record on Appeal in the *Keister* action (75-2431). "W" refers to the Clerk's Record on Appeal in the *Willamon* action (75-2495).

1. W 76, lines 17-19; and W 6, lines 10-15.
2. W 112, lines 21-28; W 112, line 31 through W 113, line 1; W 120, lines 13-17; and RT 38, line 13.
3. RT 26, lines 12-15; RT 38, lines 7-13; RT 40, lines 2-6; and Rand McNally & Company's *Handy Railroad Atlas of the United States,* copyright 1973, at page 10.
4. W 6, lines 19-25; and W 117, lines 3-6.
5. W 83, line 30 through W 84, line 1; and W 34, lines 31-32.
6. W 35, lines 1-2; and W 32, lines 23-32.
7. W 117, line 31 through W 118, line 22; W 3, line 32 through W 33, line 1; and W 35, lines 4-5.
8. W 116, lines 17-22.
9. W 121, line 31 through W 122, line 4.
10. W 122, line 31 through W 123, line 25.
11. K 12, lines 22-25; K 55, lines 5-10; K 110, lines 21-25.
12. K 111, lines 1-11; and K 55, lines 5-8.
13. K 107, lines 24-28; and K 110, lines 21-25.
14. K 110, lines 25-27; and K 111, lines 20-22.
15. K 96, lines 25-27; and K 50-51.
16. K 76-77; and K 74-75.
17. K 96, line 28 through K 97, line 4.
18. K 78-79.
19. K 94.

20. W 1-4 and K 1-4 (particularly W 1, line 27 through W 2, line 4 and K 1, line 27 through K 2, line 1 relating to allegations of federal jurisdiction, and that petitioners and respondent were engaged in interstate commerce when the injuries occurred).
21. W 16-18; K 44-46.
22. W 17-20; K 45-51.
23. K 121-123. See Appendix "B" and "C" herein for order and judgment.
24. W 63-64. See Appendix "D" herein for order.
25. See Appendix "A" herein for opinion and judgment.
26. W 65; see Appendix "A" herein for opinion and judgment.
27. Alaska, Arizona, California, Idaho, Maine, Michigan, Minnesota, Montana, New York, North Dakota, Texas, Vermont and Washington. Rand McNally & Company's *Handy Railroad Atlas of the United States,* copyright 1973.
28. Report of the Senate Committee on the Judiciary on Senate bill No. 1708, to amend section 51 of chapter 2, title 45, of the United States Code, 76th Cong., 1st Sess., Rept. No. 661 (1939), at page 3.
29. *Id.*
30. RT 43, line 23 through RT 44, line 5.
31. RT 44, lines 13-17.
32. W 60-62; K 117-119.
33. W 59; K 105.

APPENDIX "A"

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL KEISTER, *Plaintiff-Appellant,* vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, *Defendant-Appellee.*	No. 75-2431
HOWARD G. WILLAMON, *Plaintiff-Appellee,* vs. SAN DIEGO AND ARIZONA EASTERN RAILROAD, a corporation, *Defendant-Appellant.*	No. 75-2495 ORDER

[July 5, 1977]

Appeal from the United States District Court
for the Southern District of California

Before: BROWNING and ELY, Circuit Judges, and
EAST,* District Judge.

We are satisfied that in neither action is there a possible claim for which relief may be granted under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970), as construed by the Supreme Court in *New York Central R.R. v. Chisholm*, 268 U.S. 29 (1925). *See Cox v. Chesapeake & Ohio R.R.*, 494 F.2d 349 (6th Cir. 1974), *cert. denied*, 417 U.S. 977 (1975); *cf. Lauritzen v. Larsen*, 345 U.S. 571, 580-81 (1953) (citing *New York Central R.R. v. Chisholm* with apparent approval). Only the Su-

*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

preme Court or the Congress can properly modify the reading of the Act adopted in *Chisholm*.

We do not consider the applicability of the Boiler Inspection Act, 45 U.S.C. §§ 22-34 (1970). This issue was not raised or considered below.

The judgment in No. 75-2431 is affirmed.

The judgment in No. 75-2495 is reversed.

APPENDIX "B"

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARL KEISTER, *Plaintiff,* vs. SAN DIEGO & ARIZONA EASTERN RAILROAD, a corporation, *Defendant.*	CIVIL NO. 73-462-T ORDER GRANTING MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER

The motion of defendant SAN DIEGO & ARIZONA EASTERN RAILROAD COMPANY to dismiss the complaint for lack of subject matter jurisdiction and because the complaint fails to state a claim upon which relief can be granted, or in the alternative for summary judgment, came on regularly for hearings in the above-entitled court on the 10th day of February, 1975, and the 31st day of March, 1975, before the Honorable Howard B. Turrentine. Defendant appeared by its attorney David E. Monahan of GRAY, CARY, AMES & FRYE; plaintiff appeared by his attorneys, Robert S. Kennedy and Clyde C. Crockett of KENNEDY & CROCKETT. The Court having heard the arguments of counsel, having reviewed the memoranda of points and authorities and affidavits submitted by both sides, and being fully advised,

IT IS ORDERED that defendant's motion be, and the same hereby is, granted, due to a lack of subject matter jurisdiction, and the complaint dismissed.

DATED: 4-14-75

HOWARD B. TURRENTINE
JUDGE

APPROVED AS TO FORM:
Clyde C. Crockett
/s/ CLYDE C. CROCKETT
Clyde C. Crockett
Attorney for Plaintiff

APPENDIX "C"

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CARL KEISTER, *Plaintiff,* vs. SAN DIEGO & ARIZONA EASTERN RAILROAD, a corporation, *Defendant.*	CIVIL NO. 73-462-T JUDGMENT OF DISMISSAL

The defendant's MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT having been heard,

IT IS ORDERED, ADJUDGED AND DECREED that the action be dismissed for want of subject matter jurisdiction, and that defendant recover its costs.

HOWARD B. TURRENTINE
JUDGE

DATED: 4-14-75

APPENDIX "D"

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD G. WILLAMON, *Plaintiff,* vs. SAN DIEGO & ARIZONA EASTERN RAILROAD, a corporation, *Defendant.*	CIVIL NO 73-71-T ORDER DENYING MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER AND CERTIFYING ISSUE FOR INTERLOCUTORY APPEAL

The defendant SAN DIEGO & ARIZONA EASTERN RAILWAY COMPANY'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT came on regularly for hearing in the above-entitled court on the 31st day of March, 1975, before the Honorable Howard B. Turrentine. Defendant appeared by its attorney David E. Monahan of GRAY, CARY, AMES & FRYE; plaintiff appeared by his attorney, Clyde C. Crockett of KENNEDY & CROCKETT.

Upon consideration of the affidavits filed by plaintiff, and the memoranda of points and authorities filed by plaintiff and defendant, and after hearing argument of counsel on both sides,

IT IS ORDERED that defendant's motions be, and the same hereby are, denied.

The above order involves a controlling question of law as to which there is substantial ground for difference of opinion, namely, whether or not the Federal Employers Liability Act applies to the facts of the instant case, which involves an injury to defendant's employee at the time said employee was engaged in the course of his employment in the Republic of Mexico. An immediate appeal from the order may materially advance the ultimate termination of the litigation in the event the order is affirmed, and may preclude the necessity for further proceedings, including trial, in the event the order is reversed.

IT IS FURTHER ORDERED that all further proceedings

herein shall be, and hereby are, stayed pending determination by the Court of Appeals whether or not to permit an interlocutory appeal from this order pursuant to 28 U.S.C. § 1292(b), or until further order of this court.

HOWARD B. TURRENTINE
JUDGE

DATED: 4-14-75

APPROVED AS TO FORM:
/s/ CLYDE C. CROCKETT
Clyde C. Crockett
Attorney for Plaintiff